PAYA KAMUNTING DEVELOPMENT SDN. BHD.

v.

MALAYSIA ASSURANCE ALLIANCE BHD. & ORS. (INTERVENERS)

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. D4-22-588-90]
26 JULY 1991

CIVIL PROCEDURE: *Application to intervene - Suit between plaintiffs and defendants based on performance bond - Indemnity by applicant - Legal rights affected - Pocket affected - Discretion of Court - Cause or matter between existing parties - Existing contract between plaintiffs and the defendants - Rules of the High Court 1980, O. 15 r. 6(2)(b).*

The first named intervener, ASB, had entered into two formal written agreements with the plaintiffs (PKD) by which they were to undertake as contractor certain infrastructural works in Negri Sembilan. The 3 other interveners were directors of ASB.

The agreement *inter alia* provided for the contractor to provide performance bonds in terms acceptable to PKD's employer pursuant to which ASB had arranged for the defendant insurance company (MAAB) to provide the required performance bonds in favour of PKD. In consideration for the provision of the performance bonds the intended interveners and each of them had given a letter of indemnity to MAAB.

The contractor failed to complete the works, wherein PKD required MAAB to pay up on the performance bonds. PKD required payment under the performance bonds from MAAB which in turn gave notice to the intended interveners that unless precluded by a Court order they would make the payments and would look to the interveners for indemnity.

This was the application of the interveners under O. 15 r. 6(2)(b) Rules of the High Court to be allowed to intervene in the proceedings between the plaintiffs and the defendants.

Held:

[1] For the applicants to succeed in their application it must not only be shown that either some legal right of theirs will be affected by the litigation or that their pocket will be affected but also that in its discretion the Court should allow the application. Nothing has been said of any legal right of the applicants being affected by the outcome of PKD's case against MAAB but in the event PKD succeed, it would almost certainly be they who would eventually foot the bill.

[2] In respect of the exercise of the Court's discretion it must be remembered that the "cause or matter" referred to in both the paragraphs of r. 6(2)(b) refers to the cause or matter, the subject of the action between the existing parties, that is, PKD and MAAB. The applicants appear to rely on r. 6(2)(b)(ii) in respect of which joinder will only be allowed where the question or issue between the person to be joined in and one of the parties is related to or connected with any relief or remedy claimed in the cause or matter between the original parties to the action and if the Court is satisfied that it would be just and convenient to have that question or issue determined with the question or issue between the existing parties. The interveners are not parties in the claim between PKD and MAAB as regards the performance bonds.

[3] Unless the contractor is relieved from the performance of the contract by any clause thereof or by statute or by a decision of a tribunal of competent jurisdiction, MAAB has to pay up on the guarantee in the event the contractor shall in any respect fail to execute the contract or commit any breach of his obligations thereunder. It is common ground that the contractor has failed to execute the contract. The question or issue between the existing parties has by contract to be restricted to those three matters that could relieve the contractor from performance of the contract. The applicants have to show that there exists a question or issue between them and either PKD or MAAB that is related to one or more of those three matters and which should conveniently be adjudicated on in the course of determining the issues between the existing parties.

[4] The reference, in the performance bonds, to the decision of a tribunal, is a reference to a tribunal of competent jurisdiction that provides relief from performance of the contract, for eg. a Court which declares that the contractor need not perform. There has been no decision by any such tribunal.

[5] Further, neither the applicants nor MAAB, who support them in their application, have been able to show that they rely on some clause of the contracts that provides relief to the contractor from performing the contract.

[6] The possibility that if MAAB fail in their action, the applicants could be called upon on their undertaking to indemnify MAAB, is *per se* not sufficient to satisfy the Court that they are entitled to be allowed to be added as parties to the action between PKD and MAAB.

[Interveners' application dismissed with costs.]

Cases referred to:

Arab-Malaysian Merchant Bank Bhd v. Dr. A. Jamaludin bin Dato' Mohd. Jarjis [1991] 1 CLJ (Rep) 19 ***(Cons)***

Gurtner v. Circuit [1968] 1 All ER 328 ***(cit)***

Spelling Goldberg Production Inc. v. B.P.C. Publishing Ltd. [1981] RPC 280 ***(foll)***

Legislation referred to:

Evidence Act 1950, s. 92

Rules of the High Court 1980, O. 15 r. 6(2)(b)

For the plaintiffs - M. Segaram; M/s. M. Segaram
For the defendants - Soo Thiang Joo; M/s. Meriam Cheah Teh & Su
For the intended interveners - M. Kayveas; M/s. Peri & Partners

JUDGMENT

VC George J:

The applicants, the (intended) interveners, seek "to be allowed to intervene" in the proceedings between the plaintiffs and the defendants. Order 15 r. 6(2)(b) Rules of the High Court 1980 was invoked which gives the Court the power to order any of the following persons to be added as a party, namely:

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;

Paragraph (3) of the rule provides that:

> An application by any person for an order under para. (2) adding him as a party must, except with the leave of the Court, be supported by an affidavit showing his interest in the matters in dispute in the cause or matter or, as the case may be, the question or issue to be determined as between him and any party to the cause or matter.

The firstnamed of the intended interveners Abama Sdn. Bhd. had entered into two formal written agreements with the plaintiffs by which they were to undertake as contractor certain infrastructural works in respect of development of certain lands in Negri Sembilan. The other three intended interveners are directors of Abama Sdn. Bhd.

The agreements *inter alia* provided for the contractor to provide performance bonds in terms acceptable to the plaintiff employer pursuant to which Abama Sdn. Bhd. arranged for the defendant insurance company to provide the required performance bonds in favour of the plaintiffs, one for RM225,000 and another for RM69,460 the validity period of each of them being from 15 February 1989 to 14 February 1990. The amounts guaranteed were to become payable "in the event the contractor (unless relieved from the performance by any clause of the contract or by statute or by the decision of a tribunal of competent jurisdiction) shall in any respect fail to execute the contract or commit any breach of his obligations thereunder". There was a provision that the insurance company be given notice of the contractor's failure in performing the covenants and that it be given the prior opportunity to remedy the contractor's failure to carry out obligations required of the contractor in performing the said covenants. In consideration for the provision of the performance bonds the intended interveners and each of them had given a letter of indemnity to the insurance company.

After having commenced part of the works the contractors apparently, since 26 April 1989, ceased doing any more of the works. Various letters sent by the consulting engineer and by the plaintiff employer requiring the contractor to get on with the works were exhibited by the plaintiffs in opposing the application to intervene. The correspondence shows that the defendant insurance company was kept informed of the ceasure of the works and of the plaintiffs requiring the contractor to resume works. Both the insurance company and Abama Sdn. Bhd. were informed that if the contractor persisted in not resuming the work, claims would be made on the performance bonds. Finally by a letter dated 5 January 1990 the plaintiffs required the defendant insurance company to pay up on the performance bonds within 14 days failing which litigation was threatened. The insurance company in turn by their letter dated 16 January 1990 to the intended interveners, referred them to the plaintiffs' letter of 5 January 1990 and gave notice that unless precluded by a Court order they would make the payments and would look to them for indemnity.

The intended interveners rely on the decision of Lord Denning MR in *Gurtner v. Circuit* [1968] 1 All ER 328 that was cited by the Supreme Court in *Arab-Malaysian Merchant Bank Bhd. v. Dr A. Jamaludin bin Dato Mohd Jarjis* [1991] 1 CLJ (Rep) 19, 21 where Gunn Chit Tuan SCJ said:

> We would refer to and respectfully adopt the following dictum of Lord Denning MR (*Gurtner v. Circuit*) in which His Lordship said as follows:
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> > It seems to me that, when two parties are in dispute in an action at law and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be found to foot the bill, then the Court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the

> Court achieves the object of the rule. It enables all matters in dispute to be effectually and completely determined and adjudicated upon between all those directly concerned in the outcome.

The fear of the applicants is that since the insurance company is covered by their letter of indemnity it would not oppose the plaintiffs' claim at least not in the manner in which they think it ought to be opposed.

For the applicants to succeed in their application it must not only be shown that either some legal right of theirs will be affected by the litigation or that their pocket will be affected but also that in its discretion the Court should allow the application. Nothing has been said of any legal right of the applicants being affected by the outcome of the plaintiffs' case against the defendants but in the event the plaintiffs succeed it would almost certainly be they who would eventually foot the bill.

In respect of the exercise of the Court's discretion it must be remembered that the "cause or matter" referred to in both the paragraphs of r. 6(2)(b) refers to the cause or matter, the subject of the action between the existing parties, that is, the plaintiffs and the defendants. The applicants appear to rely on r. 6(2)(b)(ii) in respect of which joinder will only be allowed where the question or issue between the person to be joined in and one of the parties is related to or connected with any relief or remedy claimed in the cause or matter between the original parties to the action and if the Court is satisfied that it would be just and convenient to have that question or issue determined with the question or issue between the existing parties. (*Spelling Goldberg Production Inc. v. B.P.C. Publishing Ltd.* [1981] RPC 280).

Now the claim of the plaintiffs against the defendant insurance company is on the performance bond in respect of which the interveners are not parties.

As has been seen, unless the contractor is relieved from the performance of the contract by any clause thereof or by statute or by a decision of a tribunal of competent jurisdiction, the insurance company has to pay up on the guarantee in the event the contractor shall in any respect fail to execute the contract or commit any breach of his obligations thereunder. It is common ground that the contractor has failed to execute the contract. The question or issue between the existing parties has by contract to be restricted to those three matters that could relieve the contractor from performance of the contract. And following *Spelling Goldberg Products Inc.*, the applicants have to show that there exists a question or issue between them and either the plaintiff or the defendant that is related to one or more of those three matters and which should conveniently be adjudicated on in the course of determining the issues between the existing parties.

The insurance company does not appear to think that there was any clause in the contracts between the plaintiffs and Abama Sdn. Bhd. or any statute that excuses the failure to execute the contract. It has to be remembered that in writing to Abama Sdn. Bhd. they said that unless precluded from doing so by an order of Court they would pay up on the bonds.

However, there has been no decision of any tribunal. One submission made on behalf of the applicants appears to be that before the plaintiffs could claim on the performance bonds they should have obtained a decision from an arbitrator. In the first place there is no such provision express or implied in the performance bonds and in any event to suggest that the tribunal referred to in the performance bonds is an arbitrator is, I think, based on a misconception. The reference is to the decision of a tribunal of competent jurisdiction that provides relief from performance of the contract. An arbitrator cannot provide such relief. I am inclined to the view that the reference is to a Court declaring that the contractor need

not perform, for example, where the contractor seeks a declaration to that effect on the ground, say, of total failure of consideration or fraud and so on. An arbitrator does not have the jurisdiction to make declaratory orders of that nature.

Secondly, neither the applicants nor the defendants (as has been seen) have suggested that some statute provided relief from performance of the contract by the contractor.

What then is left is some clause in the contract that provides the relief. Enclosure (40), the joint affidavit of Mohd Seth bin Dato Abu Bakar and T. Narendran, is the affidavit on which the applicants rely for support in respect of their application. They contend that the non-performance by Abama Sdn. Bhd. of its obligations under the contract was because the plaintiffs had failed to pay 10% of the agreed contract sum in advance and because after having commenced the works Abama Sdn. Bhd. discovered as set out in para. 9 of encl. (40):

> that Paya Kamunting Development Sdn. Bhd. had materially misrepresented to Abama Sdn. Bhd. as to the actual status of the project and the technical aspects and was also not co-operating or willing to co-operate by providing the necessary information and clarification. The plaintiff also failed to make the 10% advance payment to Abama Sdn. Bhd.

Another contention made in para. 11 of the affidavit was that:

> Abama Sdn. Bhd. ceased to carry on further works and handed all documents to another contractor as instructed by the plaintiff. Abama Sdn. Bhd. was led to believe then that the plaintiff would reimburse Abama Sdn. Bhd. all expenses incurred and monies expended by Abama Sdn. Bhd. and the Insurance Guarantees would be allowed to lapse/not invoked.

It is also alleged in para. 13(vi) that:

> The breach which caused Abama Sdn. Bhd. not to carry on/to be unable to carry on with the works under the contract was on the part of the plaintiff and not Abama Sdn, Bhd.

There is however no provision in the contract documents or in any other document to even suggest that a 10% advance was to be paid. Section 92 of the Evidence Act precludes any evidence to back such a suggestion that there was such a further term in the contracts. That also puts paid to what is alleged in the said para. 13(vi) of the affidavit, the breach referred there being the failure to pay the advance of 10% of the lump sum contract amount. And there is nothing to back up what is alleged in the said para. 11 of the affidavit. Nothing at all has been produced to show how Abama Sdn. Bhd. came to believe what the deponents say it was led to believe.

I have to conclude as I do that the reliance placed on those paragraphs takes the applicants nowhere. I have to conclude that neither the applicants nor the defendants who support them in their application have been able to show that they rely on some clause of the contracts that provides relief to the contractor from performing the contract.

While it is appreciated that there is no doubt that if the defendants fail in their action the applicants could be called upon on their undertaking to indemnify the defendants, that *per se* is not sufficient to satisfy the Court that they are entitled to be allowed to be added as parties to the action between the plaintiffs and the defendants. In *Gurtner v. Circuit* the Court allowed the Motor Insurance Bureau to take over the defence in the absence of the defendant who could not be traced because not being able to trace the defendant was one of those circumstances where by agreement with the relevant Minister the Bureau had undertaken to pay the damages found payable to the injured plaintiff.

The ratio used there cannot be applied to the case of a performance bond on which a suit is based and some dispute that may exist between the parties to the contract pursuant to which the performance bond was issued.

The application encl. (30) is dismissed with costs.

Also found at [1991] 3 CLJ 2894